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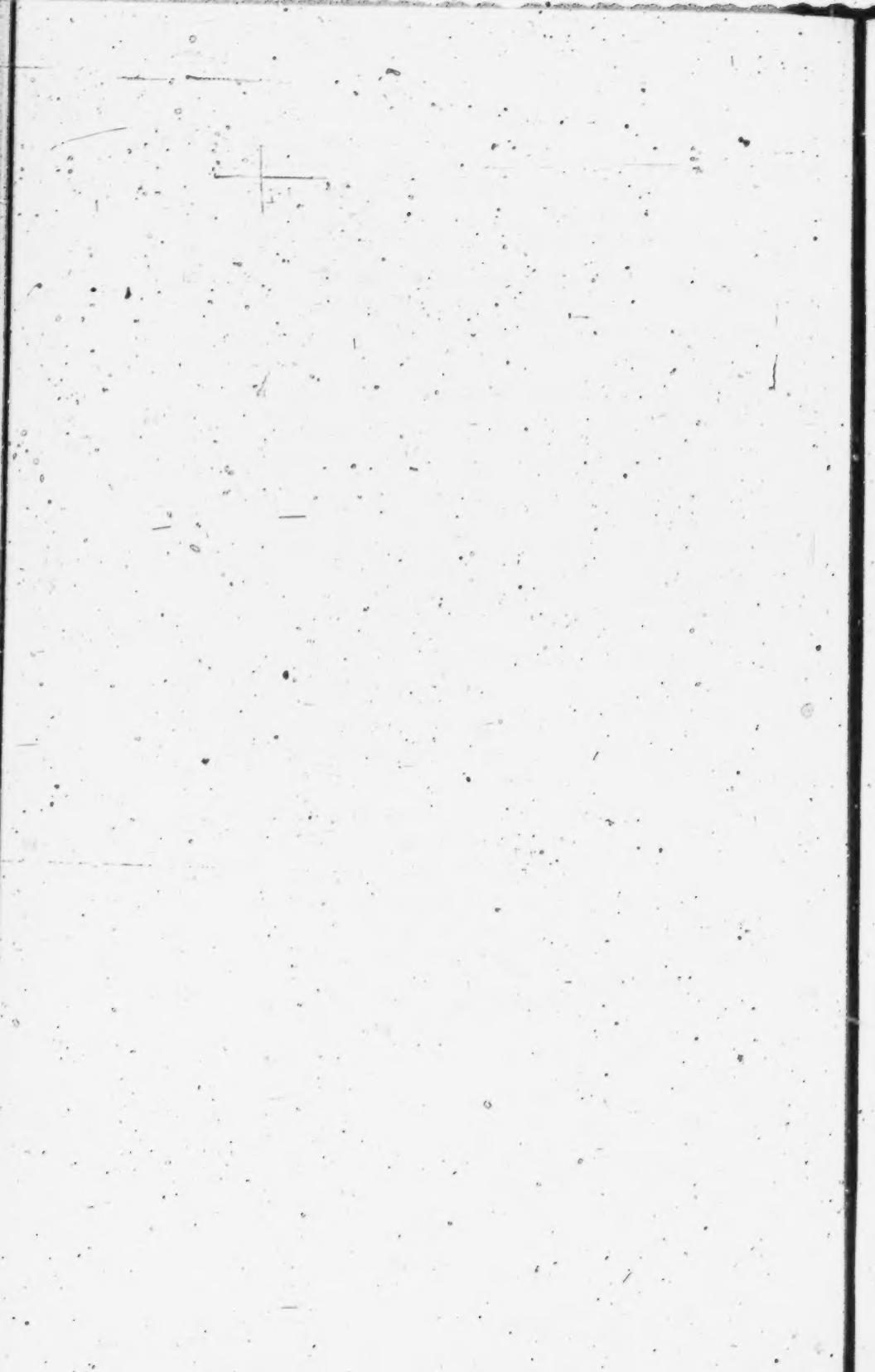
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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 22

THE UNITED STATES OF AMERICA, PETITIONER

v.

CONTINENTAL NATIONAL BANK AND TRUST COMPANY,
TRUSTEE UNDER THE LAST WILL AND TESTAMENT
OF JAMES DUGGAN, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 20-25) is reported at 94 F. (2d) 81. The District Court did not file a written opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 5, 1938. (R. 26.) The petition for a writ of certiorari was filed April 5, 1938, and was granted May 16, 1938. (R. 26.)

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the limitations period provided by Section 311 (b) (2) of the Revenue Act of 1928 is applicable in a proceeding to collect from transferees of a taxpayer the amount of their liability at law or in equity for unpaid Federal income and profits taxes due for the year 1920.
2. Whether this action was barred by any applicable provision of the Revenue Act of 1926.

STATUTES INVOLVED

The pertinent statutes involved are printed in the Appendix, *infra*, pp. 43-52.

STATEMENT

This is a suit in equity, brought by the petitioner in the United States District Court for the Northern District of Illinois, Eastern Division, on May 6, 1932, against the Continental National Bank and Trust Company, as trustee under the will of James Duggan, deceased, to collect the sum of \$295,331.64, with interest as provided by law, representing the amount of the liability of James Duggan, deceased, for unpaid Federal income and profits taxes amounting to \$316,620.61 due from Johnston City & Big Muddy Coal & Mining Company, a dissolved Illinois corporation, for the calendar year 1920.

The other defendants named in the bill of complaint are beneficiaries of the testamentary trust created by the decedent.

The defendants moved to dismiss the petitioner's bill of complaint on the grounds that it failed to state a cause of action and that it was barred by the statute of limitations. The bar of the statute of limitations was alleged in particular to arise because of the provisions of Sections 278, 277, and 280 of the Revenue Act of 1926 and of Section 311 (b) of the Revenue Act of 1928 (R. 12-13). Before the defendants' motion to dismiss was acted upon by the District Court the petitioner's original bill of complaint (R. 1-11) was amended by leave of court (R. 13-15) to include the additional allegation of fact that on February 14, 1931, the Commissioner of Internal Revenue made a jeopardy assessment against James Duggan, deceased, in the sum of \$295,331.64 representing the amount redetermined by the Board of Tax Appeals as his liability for unpaid taxes due from the Johnston City & Big Muddy Coal & Mining Company. The defendants' motion to dismiss was thereupon renewed. (R. 14.) Briefs were thereafter submitted to the District Court by both parties but oral argument was not heard. On March 22, 1937, the District Court entered an order, without written opinion, dismissing the petitioner's bill of complaint. (R. 14, 16.) The order of dismissal was affirmed by the Circuit Court of Appeals for the

Seventh Circuit in an opinion filed January 5, 1938.
(R. 20-25.)

The bill of complaint (R. 1-11), as amended (R. 13-15), shows that James Duggan, deceased, was during the years 1919 and 1920 the principal owner and stockholder of Johnston City & Big Muddy Coal & Mining Company, an Illinois corporation engaged in the business of mining and selling coal; and that the Johnston City & Big Muddy Coal & Mining Company owned a subsidiary corporation organized under the laws of Illinois and known as the Johnston City Coal Company. (R. 2-3.)

On May 16, 1921, the Johnston City & Big Muddy Coal & Mining Company filed a consolidated income and profits tax return for the calendar year 1920 which included the income and deductions of Johnston City Coal Company. A tax of \$5,269.21 shown thereon to be due was paid. (R. 3.)

Upon auditing the return filed by Johnston City & Big Muddy Coal & Mining Company for 1920 the Commissioner of Internal Revenue found that the income of the company had been greatly understated, and that there was due from the company an additional tax for 1920 in the sum of \$316,620.61. A statutory deficiency notice under Section 274 (a) of the Revenue Act of 1924 was mailed to the company under date of December 16, 1924, notifying it of this proposed deficiency. No ap-

peal from this notice was taken to the Board of Tax Appeals by the company. The amount of this deficiency was assessed against the company by the Commissioner on his January, 1925, list but no part of the assessment has ever been paid. (R. 3.)

During 1920 and 1921 the Johnston City & Big Muddy Coal & Mining Company was in process of liquidation. Its assets were converted into cash and commercial securities under the direction of James Duggan, and as a stockholder in the company he received and kept in his possession assets of the corporation to the amount of \$295,331.64 which were converted to his own use and purposes without payment or rendering value therefor in return, and without paying or discharging the obligation of the company to the Government of the United States for the unpaid income and profits taxes assessed against it for the year 1920. (R. 3.)

The Johnston City & Big Muddy Coal & Mining Company was dissolved December 29, 1921, and was left without assets available to pay the taxes assessed against it in January, 1925. Thereupon the Commissioner, by a registered letter dated April 15, 1926, notified James Duggan that under the provisions of Section 280 of the Revenue Act of 1926 there was proposed for assessment against him the sum of \$295,331.64, constituting his liability at law or in equity as a transferee of the assets of Johnston City & Big Muddy Coal & Min-

ing Company for the unpaid taxes assessed against the company. (R. 14-15.)

Upon receipt of this notice James Duggan filed an appeal with the United States Board of Tax Appeals, issue was joined, and the appeal came on for hearing in due course. On January 6, 1930, the Board promulgated its findings of fact and opinion. On January 27, 1931, it entered its decision in the appeal of James Duggan wherein his liability as transferee for income and profits taxes due from Johnston City & Big Muddy Coal & Mining Company for the year 1920 was fixed at \$295,331.64, with interest thereon as provided by law from December 6, 1924. No appeal was taken from the decision of the Board within the time provided by law and the decision became final six months thereafter. (R. 11, 14-15.) See 18 B. T. A. 608.

On February 14, 1931, the Commissioner of Internal Revenue made a jeopardy assessment against James Duggan, deceased, under authority of Section 279 of the Revenue Act of 1926 in the sum of \$404,992.73, representing the amount redetermined by the Board of Tax Appeals to be his liability as transferee of the assets of Johnston City & Big Muddy Coal & Mining Company, plus interest thereon in the sum of \$109,661.09. (R. 15.)

James Duggan died testate in March, 1929, leaving an estate worth approximately \$1,500,000 after payment of administration expenses and claims

other than the claim of the Government for the above \$295,331.64, plus interest. Michael Duggan, who was named executor in his will, had died previously and the Biscayne Trust Company of Miami, Florida, was duly appointed and qualified as executor. The Biscayne Trust Company became financially involved and was placed in the hands of a receiver, and was formally dismissed as such executor. Thereafter Lee C. Robinson was appointed and qualified as administrator d. b. n. e. t. a. on September 15, 1930. (R. 2, 5.)

Lee C. Robinson, while having actual notice and knowledge of the claim against James Duggan, deceased, distributed to Henry Duggan, one of the defendants named in the bill of complaint, the sum of \$50,000 pursuant to the terms of James Duggan's will, and distributed to the Continental National Bank & Trust Company, as testamentary trustee, all of the rest and residue of the estate of James Duggan, deceased. The Continental National Bank & Trust Company, as trustee under the will of James Duggan, now has in its possession the entire corpus of the estate of James Duggan distributed to it as such testamentary trustee. (R. 5.)

No part of the obligation of James Duggan, deceased, as established by the Board of Tax Appeals has ever been paid. (R. 15.)

In affirming the order of dismissal, the Circuit Court of Appeals held that the six-year period

provided by Section 278 (d) of the 1926 Act for collection, following a timely assessment, from the original taxpayer was not made applicable by Section 280 (a) of that Act to a proceeding, following a timely assessment, for collection from a transferee. (R. 24-25.) Apparently considering that the 1926 Act provided no limitations period for such proceedings, the court held that this hiatus had been filled by the Revenue Act of 1928. Applying Section 311 (b) (2) of that Act, it held that this suit was barred since it had not been brought within three years after expiration of the period for assessment against the original taxpayer.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that this action was barred by the provisions of Section 311 (b) of the Revenue Act of 1928 at the time it was instituted, and in affirming the judgment of the District Court on that ground.
2. In holding that this action was barred by any applicable statute of limitations at the time it was instituted.
3. In failing to hold that this action was timely brought within the period of limitations properly applicable.
4. In affirming the judgment of the District Court dismissing this action.

SUMMARY OF ARGUMENT**I**

This action was brought within the period provided by the applicable statute of limitations.

The 1920 income and profits tax return of Johnson City & Big Muddy Coal & Mining Company was filed May 16, 1921, and the Commissioner had five years from that date, or until May 16, 1926, within which to assess any additional tax against the company. Section 277 (a) (3) of the Revenue Act of 1926. The additional tax was timely assessed in January, 1925. The Treasury Department thereupon had six years, or until January, 1931, in which to collect the amount of the assessment, either from the Company or from its transferees. Section 278 (d) of the 1926 Act; *United States v. Updike*, 281 U. S. 489.

Instead of a proceeding in equity to enforce a transferee liability, the Commissioner adopted the alternative remedy of notice, assessment and collection against the transferee of the taxpayer. Section 280 of the 1926 Act. Under this section the applicable periods of limitation are those of the 1926 Act.

Under Section 280 (b) (1) the Commissioner had one year after expiration of the period for assessment against the Company in which to assess the liability of its transferees. On April 15, 1926, which was thirteen months and a day prior to the expiration of this latter period, the Commissioner

notified James Duggan that he proposed to assess a transferee liability against him for a part of the unpaid taxes of the Company. The Commissioner was prohibited from assessing this proposed liability for sixty days after this notice was sent. Section 274 (a) of the 1926 Act. During this sixty-day period, James Duggan filed an appeal with the Board of Tax Appeals. It was pending before the Board until the decision was entered on January 27, 1931. No appeal was taken and the decision became final on July 27, 1931. During this whole period, ~~and for sixty days thereafter, until September 25, 1931,~~ the Commissioner was prohibited from making an ordinary assessment. Section 274 (a) of the 1926 Act. The running of the period of limitation for assessing James Duggan was thus suspended during this period and for sixty days thereafter, or until September 25, 1931. Section 280 (d) of the 1926 Act, as amended. Since the period had thirteen months and a day to run when the deficiency notice was sent, the period for assessing James Duggan expired on October 26, 1932.

In fact, a jeopardy assessment against James Duggan was made on February 14, 1931. Since Section 280 contains no separate limitation on collection, the Government had six years from the date of the assessment, or until February 14, 1937, within which to collect the tax, either against James Duggan or his transferees. Section 278 (d). The bill of complaint, for recovery from the defendants, was filed against respondents on May 6, 1932.

The court below erred in refusing to apply the six-year period for collection to assessments made under Section 280, since subsection (a) plainly makes "the same provisions and limitations as in the case of a deficiency" of a taxpayer applicable to transferee assessments. But even if there must be collection within the assessment period, it has been shown that suit was commenced several months before this period expired.

This analysis does not mean, as the court below feared, that there would be a series of six-year periods in which to collect the tax from each successive transferee. The Commissioner has authority, as limited by Section 280 (b) (1), to make transferee assessments only during a period which is one year longer than the period in which to make taxpayer assessments (the running of the period being suspended under Section 280 (d) while he is prohibited from making assessments and for sixty days thereafter). The six-year collection period, of course, applies only to taxes which have been assessed in time.

II

The court below held the action barred by the provisions of Section 311 (b) of the Revenue Act of 1928. In this the court erred. The provisions of Section 311 of the 1928 Act are, by the very language of the Act, made applicable only to taxes imposed under that Act for the taxable year 1928 and subsequent taxable years.

III

The fact that James Duggan died during the pendency of the proceeding under Section 280 does not affect the suspension of the period for assessing against him the amount of his liability as a transferee of the taxpayer. The suspension of the period for assessment was effective regardless of whether or not the Board lost jurisdiction of the proceeding before it after his death. The fact that the transferee liability of James Duggan was assessed after his death is likewise immaterial. That assessment was sufficient in law to permit collection by a proceeding in court if brought within six years. This period is applicable regardless of whether the proceeding to collect was brought against him or against parties who had become liable in the meantime for the amount of the assessment.

That suit against the transferees of James Duggan could have been maintained, had the Commissioner known of the transfer, is immaterial. The period of limitation for assessment against James Duggan was suspended during the proceedings before the Board of Tax Appeals, and the statute gives six years after its assessment to collect the tax.

Respondents' argument that the possibility of a jeopardy¹ assessment prevents suspension of the period for assessment during the Board proceedings is contradicted by the purpose and language

of the Act and the decisions of this and the lower courts.

IV

The testamentary trustee of the trust created by the will of James Duggan for the benefit of Henry Duggan is not removed from this proceeding by the death of Henry Duggan. Nor does the death of Henry Duggan relieve the trustee of that trust of its liability for the amount of the Government's claim.

ARGUMENT

I

THE INSTANT SUIT WAS TIMELY UNDER APPLICABLE PROVISIONS OF LAW.

The bill of complaint alleges that defendants received property from the estate of James Duggan, deceased, impressed with a trust in favor of the United States for unpaid income and profits taxes due for 1920 from Johnston City & Big Muddy Coal & Mining Company. So far as here material, the motion to dismiss raised only questions of the statute of limitations.¹ It is clear, we submit, that

¹ The motion to dismiss was also based upon the ground that the bill of complaint failed to allege facts sufficient to constitute a good cause of action against them, or any of them (R. 12-13). This ground was not urged below, and was not discussed in the defendants' brief in opposition to the petition for a writ of certiorari, and need not be considered here.

this action was not barred at the time it was instituted.

1. The facts material to this question may briefly be restated. The Johnston City & Big Muddy Coal & Mining Company filed its consolidated income and profits tax return for the calendar year 1920 on May 16, 1921, and paid the amount shown thereon to be due (R. 3). In January, 1925, the Commissioner, after notice under Section 274 (a) of the Revenue Act of 1926, assessed an additional tax of \$316,620.61 against the company, but the tax could not be collected from the company, which had distributed its assets in liquidation and had been dissolved in 1921 (R. 3, 4). The Commissioner on April 15, 1926, notified James Duggan by registered mail, pursuant to Section 280 of the Revenue Act of 1926, that he proposed to assess against him the sum of \$295,331.64, constituting his liability as a transferee for income and profits taxes due from the company for the year 1920 (R. 4). Upon receipt of this notice James Duggan appealed to the United States Board of Tax Appeals for a redetermination of his liability (R. 4, 14-15). In due course a hearing was had before the Board of Tax Appeals, and after full consideration the Board, on January 27, 1931, entered its decision affirming the determination of the Commissioner and fixing the liability of James Duggan as such transferee in the sum of \$295,331.64 with

interest thereon as provided by law from December 6, 1924 (R. 4, 11, 14-15). On February 14, 1931, the Commissioner made a jeopardy assessment against James Duggan in the sum of \$404, 992.73, being the above amount of \$295,331.64 plus interest thereon in the sum of \$109,661.09 (R. 15). James Duggan having died in the meantime, and his estate having been administered, there remained no assets in the hands of his legal representatives from which the amount of this assessment could be collected. Compare *Hulburd v. Commissioner*, 296 U. S. 300. This action was thereupon instituted, on May 6, 1932, against the defendants, who had received the assets of his estate, to recover from the assets of James Duggan in their hands the amount assessed against him on February 14, 1931, as his liability for unpaid taxes due from Johnston City & Big Muddy Coal & Mining Company, with interest thereon as provided by law.

The 1920 income and profits tax return of Johnston City & Big Muddy Coal & Mining Company was filed May 16, 1921, and the Commissioner had five years from that date, or until May 16, 1926, within which to assess any additional tax against the company. Section 277 (a) (3) of the Revenue Act of 1926, *infra*. The additional tax of \$316, 620.61 was timely assessed against the taxpayer corporation in January, 1925.

Under Section 278 (d) of the Revenue Act of 1926,² *infra*, the Treasury Department had six years from the date of assessment within which to collect the amount of that assessment.³ Compare *Florsheim Bros Co. v. United States*, 280 U. S. 453, 467-468. *Welch Ins. Agency v. Brast*, 55 F. (2d) 60, 62 (C. C. A. 4th), certiorari denied, 285 U. S. 555; *Motter v. Garrison*, 43 F. (2d) 34 (C. C. A. 10th); *Heffernan v. Alexander*, 48 F. (2d) 855, 858-859 (W. D. Okla.). This period for collection after assessment is equally applicable where a suit at law or in equity is brought against transferees of the taxpayer to collect the amount of the assessment against it. *United States v. Updike*, 281 U. S. 489; *United States v. Crook*, 18 F. (2d) 449 (C. C. A. 5th), certiorari denied, 275 U. S. 532.

The Government could have enforced the transferee liability of James Duggan at any time during this six-year period, expiring in January, 1931, by an appropriate action in equity. However, this remedy for the enforcement of James Duggan's liability was not adopted. Instead, the Commissioner adopted the new remedy authorized by Sec-

² That section was amended by Section 506 (a) of the Revenue Act of 1928, *infra*, in a manner not material here.

³ The limitation in Section 278 (e) of the Revenue Act of 1926, *infra*, is inapplicable here. That provision excepts from Section 278 (d) such proceedings where the assessment, distress, or collection in court was barred at the time of enactment, February 26, 1926. This was not the case here. See Sections 278 (d) and (e) of the Revenue Act of 1924 and Section 250 (d) of the Revenue Act of 1921.

tion 280 of the Revenue Act of 1926, *infra*, and the question of limitation now before this Court is to be determined in accordance with the provisions of law which are applicable to cases in which the latter remedy is adopted.

2. As this Court said in *Phillips v. Commissioner*, 283 U. S. 589, 592, stockholders who have received the assets of a dissolved corporation may be compelled, "in an appropriate proceeding", to discharge unpaid corporate taxes, but that "before the enactment of § 280 (a) (1), such payment by the stockholders could be enforced only by bill in equity or action at law." Since the enactment of Section 280 of the 1926 Act, however, the "liability of the transferee for such taxes may be enforced in the same manner as that of any delinquent taxpayer", and "the procedure prescribed for collection of the tax from a stockholder is thus the same as that now followed when payment is sought directly from the corporate taxpayer." See also *Hulburd v. Commissioner*, 296 U. S. 300, 303.

The new remedy is not exclusive, but is in addition to proceedings to enforce a tax lien, or an action at law or in equity. *United States v. Greenfield Tap & Die Corp.*, 27 F. (2d) 933 (Mass.); *United States v. Updike*, 25 F. (2d) 746, 747 (Nebr.), affirmed, 32 F. (2d) 1, 4 (C. C. A. 8th), and 281 U. S. 489; *Phillips v. Commissioner*, *supra*, 593-594, note 3; *Hulburd v. Commissioner*, *supra*, 303.

In the instant case the Commissioner proceeded under Section 280 of the 1926 Act to enforce the transferee liability of James Duggan (R. 4). Under subsection (a) of that section his liability, except as otherwise provided in the section, is to be "assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax" imposed by Title II of the 1926 Act, "including * * * the provisions authorizing distress and proceedings in court for collection." Accordingly, the questions of limitation raised by the motion to dismiss are governed by the provisions of the Revenue Act of 1926 (some of which were amended by the Revenue Act of 1928). *United States v. Updike*, 281 U. S. 489, 493-494; *Helvering v. Newport Co.*, 291 U. S. 485, 487.

3. Section 280 (a) provides that the liability of a transferee shall, "except as hereinafter in this section provided" be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in income taxes imposed by the Act. This section makes applicable the provisions of Section 274 of the Revenue Act of 1926, *infra*. Subsection (a) of the latter section provides for formal notice of deficiency (or of liability at law or in equity in the case of transferees and fiduciaries); authorizes appeal to the Board of Tax Appeals; and, except as otherwise specifically provided, prohibits any assessment, or any distress or proceeding in court

for collection, until after the appeal period has expired, or if an appeal is filed, until the decision of the Board has become final.

Since the period for assessment against the Johnston City & Big Muddy Coal & Mining Company did not expire until May 16, 1926, which was after the enactment of the Revenue Act of 1926, the proper period within which the liability of a transferee of the taxpayer may be assessed is that contained in Section 280 (b) (1), which provides that such liability may be assessed within one year after the expiration of the period of limitation for assessment against the taxpayer.⁴ The Commissioner therefore had until May 16, 1927, within which to assess the transferee liability of James Duggan.

On April 15, 1926, which was one year, one month, and one day prior to the expiration of the period of limitation for assessment of the transferee liability of James Duggan, the Commissioner mailed a statutory notice to him pursuant to Section 280 (a), proposing to assess against him the sum of \$295,331.64, representing his liability as a transferee for unpaid income and profits taxes due from Johnston City & Big Muddy Coal & Mining

⁴ Had the period for assessment against the taxpayer expired before the enactment of the Revenue Act of 1926, the period of limitation for assessment against transferees would be governed by Section 280 (b) (2), *infra*.

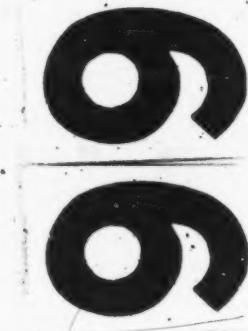
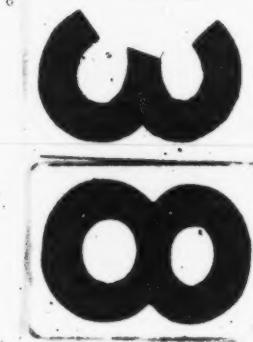
The fact that the corporate taxpayer had been dissolved does not affect this period for assessment against the transferee. See Section 280 (c) of the Revenue Act of 1926, *infra*.

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Company for the year 1920 (R. 4). This notice under Section 280 (d)⁸ had the effect of suspending the period of limitation for assessment against James Duggan for a period of sixty days, during which period the Treasury Department was prohibited by Section 274 (a), *infra*, from assessing the tax or attempting to collect it from him.

On June 11, 1926, which was prior to the expiration of this sixty day period, James Duggan filed an appeal with the United States Board of Tax Appeals (R. 4, 14). That appeal remained on the Board's docket until disposed of by a final decision entered January 27, 1931 (R. 4, 11, 14-15).⁹ During the time this appeal was pending before the Board, the Commissioner was prohibited by Section 274 (a) from assessing the liability involved, and under Section 280 (d), as amended, the period for making the assessment against him was suspended from the date the notice under Section 280 was mailed to him until the Board's decision became final, and for sixty days thereafter.¹⁰

⁸ Amended by Section 505 (a) of the Revenue Act of 1928, *infra*.

⁹ This decision was entered pursuant to the findings of fact and opinion of the Board promulgated January 6, 1930, reported at 18 B. T. A. 608. See also 21 B. T. A. 740.

¹⁰ Except as otherwise specifically authorized by that section, including, *inter alia*, jeopardy assessments under Section 279 (a).

* See *Brown & Sons Co. v. Burnet*, 282 U. S. 283; *Mutual Lumber Co. v. Poe*, 66 F. (2d) 904 (C. C. A. 9th), certiorari denied, 290 U. S. 706; *American Equitable Assur. Co. of*

No appeal was taken from the Board's decision within the time permitted by Section 1001 (a) of the 1926 Act and the decision became final on July 27, 1931. Section 1005 (a) of the 1926 Act. The period for assessment against James Duggan was therefore extended by Section 280 (d), as amended, at the least until September 25, 1931, sixty days after the decision became final. And, since the statute provides for the suspension of the running of the period, rather than its extension to a given date, the period for assessment of James Duggan's transferee liability was extended one year, one month, and one day (the number of days remaining of the period for such assessment when the notice of April 15, 1926, was mailed) from September 25, 1931, or until October 26, 1932. *Continental Oil Co. v. United States*, 14 F. Supp. 533, 539-540, certiorari dismissed as premature, 293 U. S. 510; *Olds & Whipple v. United States*, 22 F. Supp. 809, 815-816. The Commissioner made a jeopardy assessment of the liability of James Duggan under authority of Section 279(a) of the 1926 Act on February 14, 1931 (R. 15). This was long prior to the expiration of the period of limitation for assessment.

New York v. Helvering, 68 F. (2d) 46 (C. C. A. 2d); *USL Battery Corp. v. Commissioner*, 32 B. T. A. 810, affirmed, 84 F. (2d) 1020 (C. C. A. 2d), certiorari denied, 299 U. S. 593; *Atlas Plaster & Fuel Co. v. Commissioner*, 55 F. (2d) 802 (C. C. A. 8th); *Parker v. Commissioner*, 30 B. T. A. 342, affirmed on other grounds, 84 F. (2d) 838 (C. C. A. 8th); *Olympic Refining Co. v. Commissioner*, 32 B. T. A. 1056.

Section 280 of the 1926 Act does not provide a separate period of limitation for *collection* of the liability of a transferee after it has been assessed. Instead, it provides that such liability shall be "assessed, collected, and paid in the same manner and subject to the same provisions and limitations" as in the case of a deficiency in income taxes. It thus makes applicable the period of limitation upon collection which is specified in Section 278 (d) of the Act. See *United States v. Updike*, 281 U. S. 489, 494; *City Nat. Bank v. Commissioner*, 55 F. (2d) 1073 (C. C. A. 5th), certiorari denied, 286 U. S. 561. The Government therefore had six years from the date of assessment of the liability of James Duggan, or until February 14, 1937, within which to collect the tax, either by distress or by a proceeding in court.* The bill of complaint was filed May 6, 1932.

4. In its opinion the court below correctly pointed out that the limitation provisions contained in subdivision (b) of Section 280 of the 1926 Act "have to do only with assessment, not with collection", but it erroneously concluded that "it was not intended that the six-year provision of section 278 should be read into it" (R. 24). This is contrary to the plain language of the statute and the

* This period applies whether the assessed tax was to be collected from James Duggan or by a suit in equity to attach liability to his transferees. *United States v. Updike, supra*; *United States v. Crook, supra*.

decisions discussed above. And, it may be noted, if the court were correct it would mean that there is no separate period of limitations upon collection after assessment of a transferee liability, and the Treasury Department would be required to collect from a transferee prior to the expiration of the period of assessment against him. It is hardly to be thought that Congress would meticulously prescribe a period of limitation for assessment, and yet remain silent as to the period for collection. Compare *Bowers v. N. Y. & Albany Co.*, 273 U. S. 346. But, even under this theory of the court below, the present action was timely. Under the decisions of the Court of Claims in *Continental Oil Co. v. United States* and *Olds & Whipple v. United States*, *supra*, the period for assessing the liability of James Duggan, or for collecting without assessment, did not expire until October 26, 1932, its running being suspended from the date of the deficiency notice until sixty days after the date the Board's decision became final. The present action was brought on May 6, 1932.

We agree with the court below "that Congress did not intend to allow a six-year period of limitation for the collection of each successive transfer of the liability of the original tax" (R. 24). The statute makes no such provision. Section 277 of the Act provides generally that the amount of the tax shall be assessed within the period specified, and Section 278 (d) provides that where the amount of the tax has been assessed within the

time prescribed it may be collected by distress or by a proceeding in court if begun within six years after the date of the assessment. This period for collection by distress or by a proceeding in court is applicable regardless of whether the proceeding is against the taxpayer, or a transferee of the taxpayer, or some subsequent transferee. *United States v. Updike, supra*; *United States v. Crook, supra*. However, if the Commissioner elects to proceed against transferees in accordance with Section 280 he has an entirely different period—that specified in subsection (b)—within which to assess the liability of transferees. In a proceeding under Section 280 it is entirely immaterial whether or not an assessment was made against the taxpayer. The period for assessment against transferees runs from the date of expiration of the statutory period for assessment against the taxpayer and not from the date the assessment was in fact made against him. *Commissioner v. Gerard*, 78 F. (2d) 485 (C. C. A. 9th); *City Nat. Bank v. Commissioner*, 55 F. (2d) 1073 (C. C. A. 5th); *Puget Sound National Bank of Tacoma v. Commissioner*, 36 B. T. A. 386. In *Goldwater v. Commissioner*, 21 B. T. A. 73, involving substantially similar facts, the Board said (pp. 75-76): “The fact that assessment was made against the corporation in January, 1925, would affect only the period for the collection of such tax from the corporation and would not alter the period for assessment [against transferees].”

The Commissioner thus has only one period under the 1926 Act for assessment against transferees. The period specified in Section 280 (b) is applicable regardless of whether the Commissioner asserts a liability against the initial transferee or against subsequent transferees. Compare *Hulburd v. Commissioner*, 296 U. S. 300, 304. After a transferee liability has been asserted under Section 280, *supra*, and a timely assessment has been made, there are six years from the date of the assessment within which to collect by distress or by a proceeding in court. As in the case of a proceeding in court to collect a timely assessment against a taxpayer, this six-year period for collection after assessment against a transferee is applicable regardless of whether the proceeding in court is brought against the transferee whose liability was asserted under Section 280 or against a subsequent transferee who has in the meantime become liable for the amount assessed.

We submit that under a proper construction of the applicable provisions of law the present action was timely.

II

THIS PROCEEDING IS NOT BARRED BY SECTION 311 (B) OF THE REVENUE ACT OF 1928

Except as indicated in the preceding section of this brief, the court below did not take direct issue

with that analysis of the provisions of the Revenue Act of 1926. It held, instead, that the action was barred by the provisions of Section 311 (b) of the Revenue Act of 1928. In so holding the court clearly was in error.

Section 311 (b) of the Revenue Act of 1928 is included in Title I of that Act. Section 1 of the Act specifically states that the provisions of Title I "shall apply only to the taxable year 1928 and succeeding taxable years". It further states that income and profits taxes "for taxable years preceding the taxable year 1928 shall not be affected by the provisions of this title, but shall remain subject to the applicable provisions of prior revenue Acts, except as such provisions are modified by Titles III, IV, and V of this Act or by legislation enacted subsequent to this Act."

If more were needed, the application of Section 311 of the 1928 Act is by its terms expressly limited to liability for taxes imposed by that Act. Subsection (a) of Section 311, *supra*, prescribes a method for collection of the "liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax * * * imposed upon the taxpayer by this title", and also of the liability of a fiduciary under Section 3467 of the Revised Statutes "in respect of the payment of *any such tax from the estate of the taxpayer.*" Subsection (b) of Section 311 prescribes the period, or periods,

within which "any such liability" must be assessed. [Italics ours.]¹⁰

It is clear, we submit, that the statute relied upon by the court below is by its express terms inapplicable to the instant proceeding. The Board of Tax Appeals reached the same conclusion in *Hoosac Mills Corp. v. Commissioner*, 29 B. T. A. 1057, reversed on another issue, 75 F. (2d) 462 (C. C. A.), 1st).

III

THE ARGUMENTS ADVANCED BY RESPONDENTS IN SUPPORT OF THEIR MOTION TO DISMISS DO NOT JUSTIFY THE DECISION BELOW

Several arguments, all revolving around the death of James Duggan during the pendency of his appeal to the Board of Tax Appeals, were advanced below by the defendants in support of their motion to dismiss and in opposition to the granting of a

¹⁰ Paragraph (1) prescribes the period for assessment of the liability of an initial transferee, paragraph (2) provides an additional period for assessment of the liability of a transferee of a transferee (with an exception applicable to both), and paragraph (3) prescribes an entirely different period for assessment against a fiduciary.

The provision of an additional period for assessment against a transferee of a transferee is new in the 1928 Act, whereas under the 1926 Act there was only one period for assessing the liability of a transferee, whether the initial transferee or a subsequent transferee. It represents an enlargement of the period within which the Commissioner might assess in the case of succeeding transfers.

writ of certiorari.¹¹ These arguments were not dealt with fully by the court below because of the ground upon which its decision was based. We submit they do not support the decision below.

1. Respondents argued in their brief in opposition to the petition for a writ of certiorari that "the period of limitation for suit against the corporation in this case had expired either in May, 1926 [five years after the return was filed], or in January, 1931 [six years after the assessment was made against the corporation in 1925]. Therefore, suit against this respondent as a transferee was barred before this suit was begun in 1932." (Br. 7.)

This argument completely ignores the intervening proceeding under Section 280 of the Revenue Act of 1926 to determine the transferee liability of James Duggan, and the effect which that proceed-

¹¹ As set out in an opinion of the Board, the case was heard on December 10, 1928. Briefs were filed, and oral argument was had on March 7, 1929. Counsel for Duggan filed a suggestion of his death on April 9, 1929. The Board's report was promulgated on January 6, 1930. The Biscayne Trust Company, as executor, was substituted on January 21, 1930. The order was vacated, after argument by opposing counsel, on April 14, 1930, and an order to show cause why it should not be substituted was issued on April 28, 1930. Return was made and argument had. On September 20, 1930, counsel for the Trust Company filed a suggestion that it had suspended operations in June, 1930, and that Lee C. Robinson was acting as administrator of Duggan's estate. On December 16, 1930, the Board directed that notices under Rule 50 be sent to Duggan, the Trust Company, and Robinson. 21 B. T. A. 740.

ing had in so far as the periods for assessment and collection of the transferee liability are concerned. That proceeding, as has been fully demonstrated above, served to suspend the period in which to assess the liability of James Duggan, and to make the period of limitation for collection of the tax six years from the date of that assessment.

It is obvious, we submit, that if this argument were sustained it would defeat the intention of Congress to allow the Government sufficient time for collection of a transferee liability where a proceeding for determination of that liability has been timely begun under Section 280, and might offer a ready means of defeating its collection entirely. It seems unthinkable that the death of James Duggan and the opportune distribution of his estate, with full knowledge of his liability to the Government, could be used to avoid provisions of law which would otherwise afford ample opportunity for the collection of that liability. If the defendants' contention in this respect were sound, it might be that any transferee, either individual or corporate, after receiving a statutory notice under Section 280, could appeal to the Board of Tax Appeals, thus preventing the Government from proceeding against him for collection, and, after expiration of the statutory period for suit against the original taxpayer, could dispose of his property to another in such a way that the liability for the tax would be shifted and the Government left without a remedy for collection.

The defendants' argument finds no support in *United States v. Updike*, 281 U. S. 489. In that case there had been no intervening proceeding under Section 280 of the 1926 Act prior to the institution of the proceeding in court for collection. The case involved income and profits taxes under the Revenue Act of 1917 for the period in 1917 prior to dissolution of the corporate taxpayer. No return under the 1917 Act had been filed by the corporation for the period involved, but in October, 1918, a revenue agent examined the books of the corporation and made a return in regular form which presumably was sufficient to start the running of the statutory period for assessment and for collection by distress or proceeding in court.¹² The additional tax shown by this return to be due for the period involved was assessed against the corporation in January, 1920.¹³ The suit against

¹² See Section 250 (d) of the Revenue Acts of 1918 and 1921; Sections 277 (a) (2) and 278 (d) of the Revenue Act of 1924; Sections 277 (a) (3) and 278 (d) of the Revenue Act of 1926.

¹³ The period for instituting a proceeding in court to collect the 1920 assessment, and presumably the period for making a new assessment against the corporation, had both expired before the Revenue Act of 1926 was approved and a notice under Section 280 (a) thereof could not have thereafter been sent to the transferees within the periods permitted by Section 280 (b). This was immaterial to the question there at issue, however, since no such notice was given and no appeal was filed with the Board of Tax Appeals.

transferees to collect the amount of the assessment was brought in 1927, more than seven years after the assessment was made. The only question considered by this Court was whether the suit was barred by the six-year limitation provision contained in Section 278 (d). The Government argued that the provision related only to suits against taxpayers to collect taxes *qua* taxes, and not to suits to collect from transferees. The Court held, however, that the suit was one to collect a liability for taxes assessed, and that because of the provision of Section 280 (a) the period was intended to apply as well to suits to collect from transferees. The decision is clear authority for the petitioner's position in this case that Section 280 (a) makes applicable the provisions of Section 278 (d) to a proceeding for collection of a timely assessment against a transferee. But it is no authority whatever for ignoring a timely assessment against a transferee, or for ignoring the effect of a proceeding against a transferee under Section 280, when the proceeding for collection must be brought against others who have become liable during the pendency of the proceeding under Section 280.

2. It has been insisted that because of the death of James Duggan and the failure to substitute his legal representatives the proceeding before the Board abated and the Board was without jurisdiction to enter its decision of January 27, 1931. This

argument, right or wrong,¹⁴ is no answer. The Board undeniably obtained jurisdiction upon the filing of the appeal. Whether it retained jurisdiction has no bearing upon the question whether the period for assessment against James Duggan was suspended by Section 280 (d) of the 1926 Act, as amended by Section 505 (a) of the 1928 Act. Even if the appeal had been filed too late, or if for some other reason the Board had never acquired jurisdiction in the first place, the period for assessment would still have been suspended. See *American Equitable Assur. Co. of New York v. Helvering*, 68 F. (2d) 46 (C. C. A. 2d); *USL Battery Corp. v. Commissioner*, 32 B. T. A. 810, affirmed, 84 F. (2d) 1020 (C. C. A. 2d), certiorari denied, 299 U. S. 593;

¹⁴ The Board held that it had jurisdiction. 21 B. T. A. 740. Its decision on that question was appealable. *Liberman's Committee v. Commissioner*, 54 F. (2d) 527 (C. C. A. 2d). The legal representatives had notice of the proceeding, and their right to appear and prosecute the appeal cannot be denied. See Rule No. 37 of the Board's Rules of Practice; *Rusk v. Commissioner*, 53 F. (2d) 428 (C. C. A. 7th). Instead of taking the necessary steps to protect the interest of the estate they refused to be substituted and allowed the Board's decision to become final, in the meantime distributing the assets of the estate. Under such circumstances it is doubtful whether the decision on the question of jurisdiction can be attacked collaterally in this proceeding. See *Sargeant v. The State Bank of Indiana*, 12 How. 371, 384-385; *White v. Crow*, 110 U. S. 183; *Toy Toy v. Hopkins*, 212 U. S. 542; *Hartford Life Ins. Co. v. Johnson*, 268 Fed. 30 (C. C. A. 8th), appeal dismissed, 258 U. S. 612; *Garcin v. Commissioner*, 22 B. T. A. 1027, 1038-1039, remanded per stipulation, 79 F. (2d) 993 (C. C. A. 4th).

Parker v. Commissioner, 30 B. T. A. 342, affirmed on other grounds, 84 F. (2d) 838 (C. C. A. 8th); *Olympic Refining Co. v. Commissioner*, 32 B. T. A. 1056. See also H. Rep. No. 2, 70th Cong., 1st Sess., pp. 23, 28; S. Rep. No. 960, 70th Cong., 1st Sess., pp. 31, 36. The court below indicated its concurrence in this, but found it immaterial because of the ground upon which its decision was based. (R. 25.)

The question of validity of the decision entered by the Board of Tax Appeals may be important in the determination of this case on its merits, but it clearly has no bearing upon the question under review. If the decision is valid, or if it is not subject to collateral attack in this proceeding, the matters therein contained are *res judicata*. If void for want of jurisdiction the matters there sought to be adjudicated may be heard *de novo*.

3. It was also argued below, and suggested in the brief in opposition to the petition for certiorari (pp. 6, 10-11), that the assessment made against James Duggan on February 14, 1931, is insufficient to permit a proceeding for collection to be brought within six years because it was based upon an *ex parte* decision of the Board, and because it was made after James Duggan's death. Neither reason is sufficient.

Even if the Board were without jurisdiction, the Commissioner's determination of James Duggan's transferee liability was *prima facie* correct, and upon dismissal of the appeal he would have had

authority to make the assessment within the time permitted by statute.

The fact that the assessment was made after James Duggan's death is immaterial. The making of an assessment is an administrative act. It does not constitute the commencement of a judicial proceeding, but is in substance only an official entry of the Commissioner's determination, and neither notice to nor the existence of the taxpayer at the time is necessary to its validity.¹⁵ The reports of the Board of Tax Appeals and the courts are filled with cases in which the assessment was made after the death or dissolution of the taxpayer. In *United States v. Updike*, 281 U. S. 489,

¹⁵ The revenue acts do not prescribe the method of making an assessment. By Section 3182 of the Revised Statutes (U. S. C., Title 26, Secs. 1530-1533) the Commissioner is authorized and required to make the necessary inquiries, determinations, and assessments of taxes and penalties, and when it is found that there is any error resulting from omission, understatement, undervaluation, or false or fraudulent statement contained in any return made by any person liable to tax the Commissioner may, at any time within the period prescribed for making an assessment, enter on any monthly or special list the name of the person liable and the amount for which he is liable. The list is then to be certified to the proper collector of internal revenue whose duty it is to collect the amount assessed. See, also, Revised Statutes, Section 3447 (U. S. C., Title 26, Secs. 1534, 1542, 1691). The language of the statute indicates that the name of the person liable and the amount of the liability are to be listed for the information of the collector, and there is nothing to indicate that the making of the assessment is a nullity if the taxpayer is dead, or, in the case of a corporation, is dissolved.

the assessment had been made after dissolution of the corporation and this Court held that it was sufficient to prevent collection by a proceeding in court instituted more than six years later. In *United States v. Crook*, 18 F. (2d) 449 (C. C. A. 5th), certiorari denied, 275 U. S. 532, the court held that an assessment made against the corporation after its dissolution was sufficient to permit collection by a proceeding in court brought within six years. In each of the few cases we have found in which the validity of an assessment has been questioned on the ground that it was made after the death or dissolution of the taxpayer the question has been decided adversely to the contention of the defendants. *Muir v. United States*, 3 F. Supp. 619 (C. Cls.); *Anderson v. United States*, 15 F. Supp. 216 (C. Cls.), certiorari denied, 300 U. S. 675; *Anderson v. United States*, 15 F. Supp. 225 (C. Cls.); *Anderson v. Bass*, 88 F. (2d) 185 (C. C. A. 5th). In the instant case the defendants, although challenging the validity of the assessment against James Duggan after his death, rely on the validity of the assessment made against the corporation several years after its dissolution.

4. In their brief in opposition to the petition for certiorari the defendants asserted that the proceeding before the Board "did not suspend the right to bring a suit against the respondent as a transferee of the coal company," and that "a suit could have been commenced against it before the

entry of what petitioner claims was the final order in the Board proceeding." (Br. 10.) This statement is only partly true. The defendants were not transferees of the coal company, and were not liable for the amount involved until the assets of James Duggan's estate were distributed to them. The Government probably could have proceeded against them immediately after the transfer and while the Board proceeding was still pending, but it would be a harsh rule which would require the Treasury to post guard over every taxpayer appealing to the Board of Tax Appeals in order to protect its rights in case of an unexpected or surreptitious disposition of assets pending determination of the appeal.

5. Respondents have also developed an argument to the effect that, if a jeopardy assessment can be made at any time during the pendency of an appeal to the Board, "then it is nonsense to claim that there is any suspension of the period for assessment". (Brief in Opp., p. 11.) The argument is completely answered by the Circuit Court of Appeals for the Ninth Circuit in *Mutual Lumber Co. v. Poe*, 66 F. (2d) 904, 907-908, certiorari denied, 290 U. S. 706. See *Brown & Sons Co. v. Burnet*, 282 U. S. 283, 288-294.¹⁶ The Commissioner is authorized to send a notice under Section 274 (a), *supra*, and is thereafter prohibited from making an

¹⁶ Compare, also, the other cases cited in footnote 8, *supra*.

assessment or attempting to collect during the period specified, "except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001". There is nothing in the Act or in its legislative history to justify the conclusion that Congress intended to nullify the general provisions suspending the period for assessment during the pendency of an appeal by permitting an immediate assessment under certain circumstances, irrespective of the general prohibition against ordinary assessment, where to delay assessment might jeopardize the revenue. Congress apparently intended that the suspension of the assessment period should be effective until the Board's decision in a case becomes final, even though it relaxed the prohibition against assessment sufficiently to permit him to act in cases of jeopardy to the revenue. In any event, the prohibition against assessment, and therefore the suspension of the period for assessment, were plainly effective in this case until the Commissioner made the jeopardy assessment against James Duggan, and even if respondents intend to suggest that the suspension of the statute of limitations was halted when the jeopardy assessment was made (See Br. in Opp. 11-12), it does not help their case. The assessment and suit would yet be timely.¹⁷

¹⁷ The assessment period, of course, does not terminate when the assessment is made. Thus, even if there should be thought not to be a six-year collection period after the

IV

THE TESTAMENTARY TRUSTEE IS STILL A PARTY TO THIS PROCEEDING IN ITS FIDUCIARY CAPACITY

The brief filed with this Court in opposition to the petition for certiorari suggested the death of Henry Duggan on October 16, 1937,¹⁸ and urged that his death "removed him and the trust for his benefit from the case". (Br. 1.) It is also argued that "there is no means by which the persons whose interests in the trust property vested on Henry Duggan's death" can be brought into this proceeding; that this bill does not reach them; and that as to the trustee of the residuary estate of James Duggan, "the cause of action was against the trust company solely as trustee and necessarily terminated with the termination of the trust and with the trust company's ceasing to be a trustee thereof". (Br. 1-2.) Counsel therefore sought to limit their appearance in this Court to the representation of the Continental National Bank & Trust Company as trustee under the \$50,000 trust created by paragraphs 3 and 4 of James Duggan's

assessment was made, and even if the jeopardy assessment of February 14, 1931, terminated the suspension of the running of the assessment period, there was an unexpired period of thirteen months and one day, plus the sixty days given under Section 280 (d), or until May 15, 1932, in which to assess and collect.

¹⁸ This was two weeks prior to the date on which the case was argued before the Circuit Court of Appeals (R. 20), but neither the court nor counsel for the Government was so advised at that time.

will. (R. 7-8.) The argument thus advanced does not merit the attention of this Court.

The death of Henry Duggan has no bearing whatever upon the right of this Court to hear and determine the questions at issue. Neither does it remove from the case the Continental National Bank & Trust Company as trustee of the residuary trust created by paragraphs 6 and 7 of James Duggan's will.

James Duggan received property of the original taxpayer impressed with a trust in favor of the United States for unpaid income and profits taxes. To the extent of the Government's claim, therefore, he held such assets as a trustee. Before that trust was discharged the assets of his estate were distributed to the defendants in accordance with the terms of his will. But they were still impressed with that trust, and to that extent the defendants succeeded James Duggan as trustees holding property impressed with a trust in favor of the Government. Compare *Hallett v. Collins*, 10 How. 174; *Allen v. St. Louis Bank*, 120 U. S. 20, 40; *Union Pacific Railway Co. v. McAlpine*, 129 U. S. 305, 314; *Albright v. Oyster*, 140 U. S. 493, 512-513; *United States v. Dunn*, 268 U. S. 121, 132. The fact that the trust in favor of the United States is a constructive trust does not alter the situation. The courts fully recognize that several trusts can exist in a single fund. See *U. S. Trust Co. v. Commissioner*, 296 U. S. 481, 487. And the

standard of duty of a trustee is no different where the trust to be enforced is a constructive trust rather than an express trust. *Buffum v. Barceloux Co.*, 289 U. S. 227, 237.

The Continental National Bank & Trust Company is properly before the Court, both in its capacity as trustee of the trust created for the benefit of Timothy Duggan and his children and in the capacity as trustee of the residuary trust created for the benefit of Henry Duggan. The death of Henry Duggan does not remove the Continental National Bank & Trust Company from this action. Neither does it relieve the trust company from the duty to defend this action nor of its liability to the Government for the amount of the claim against assets held by it impressed with a trust for unpaid taxes. See Section 281 of the Revenue Act of 1926.

Furthermore, in view of the provisions of Section 3467 of the Revised Statutes, amended by Section 518 of the Revenue Act of 1934, c. 277, 48 Stat. 680, 760, the trust company could not avoid liability for the amount of the Government's claim, or defeat its right to maintain this action, even if it could prevail upon the proper state court to permit distribution of the trust corpus. See *United States v. Kaplan*, 74 F. (2d) 664 (C. C. A. 2d); *United States v. Porter*, 24 F. (2d) 139, 144 (Idaho); *Pennsylvania Cement Co. v. Bradley Contracting Co.*, 274 Fed. 1003 (S. D. N. Y.); *In re Vetterlein*, 44 Fed. 57 (S. D. N. Y.); *United States v. Dewey*,

39 Fed. 251 (C. C. S. D. N. Y.); *United States v. Barnes*, 31 Fed. 705 (C. C. S. D. N. Y.); *Davis v. Bargloff*, 200 Ia. 1160. The individual liability of the trustee, if it should distribute the funds in the face of these proceedings, could probably be enforced in this proceeding by supplemental pleading. See Rule 15 (d) of Federal Rules of Civil Procedure.

It is true that the death of Henry Duggan has removed him from this proceeding as a party defendant unless his personal representatives are substituted in his stead.¹⁹ His removal from the case, however, is not fatal. The bill of complaint shows that he received a bequest of \$50,000 from the estate of James Duggan. Accordingly, his liability is limited to that amount. The Continental National Bank & Trust Company received \$50,000 in trust for the benefit of Timothy Duggan and his children, and received the residue of James Duggan's estate of the value of \$1,500,000 in trust for the benefit of Henry Duggan. The liability of the defendants is joint and several to the extent of the value of the assets received. *Phillips v. Commissioner*, 283 U. S. 589, 603; *Phillips-Jones Corp. v. Parmley*, 302 U. S. 233. The trust company holds assets more than sufficient to

¹⁹ A motion for substitution of the Continental National Bank & Trust Company as executor of the last will and testament of Henry Duggan, deceased; is being filed by counsel for the petitioner.

satisfy the Government's claim and if the executors of the will of Henry Duggan are not substituted a judgment for the full amount of the claim can be entered against the trust company.

CONCLUSION

The decision of the court below is wrong and should be reversed.

Respectfully submitted.

ROBERT H. JACKSON,

Solicitor General.

JAMES W. MORRIS,

Assistant Attorney General.

SEWALL KEY,

J. LOUIS MONARCH,

F. E. YOUNGMAN,

Special Assistants to the Attorney General.

WARNER W. GARDNER,

Special Attorney.

SEPTEMBER, 1938.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount deter-

mined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distress or by proceeding in court with or without assessment.

* * * * *

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1912, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distress or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distress or a proceeding in court, and for 60 days thereafter.

SEC. 278. (d) Where the assessment of any income, excess-profits, or war-profits tax

imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distress or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distress and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer.

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period,—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

(3) If a court proceeding against the taxpayer for the collection of the tax has been begun within either of the above periods,—then within one year after return of execution in such proceeding.

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary, and for 60 days thereafter.

(e) This section shall not apply to any suit or other proceeding for the enforcement of the liability of a transferee or fiduciary pending at the time of the enactment of this Act.

(f) As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

SEC. 281. (a) Upon notice to the Commissioner that any person is acting in a fiduciary capacity such fiduciary shall assume the powers, rights, duties, and privileges of the taxpayer in respect of a tax imposed by this title or by prior income, excess-profits, or war-profits tax Act (except as otherwise specifically provided and except that the tax shall be collected from the estate of the taxpayer), until notice is given that the fiduciary capacity has terminated.

(b) Upon notice to the Commissioner that any person is acting in a fiduciary capacity for a person subject to the liability specified in section 280, the fiduciary shall assume, on behalf of such person, the powers, rights, duties, and privileges of such person under such section (except that the liability shall be collected from the estate of such person), until notice is given that the fiduciary capacity has terminated.

(c) Notice under subdivision (a) or (b) shall be given in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

(d) In the absence of any notice to the Commissioner under subdivision (a) or (b), notice under this title of a deficiency or other liability, if mailed to the taxpayer or other person subject to liability at his last known address, shall be sufficient for the purposes of this title even if such taxpayer or other

person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

SEC. 1109. (a) Except as provided in sections 277, 278, 310 and 311—

* * * * *

(3) Where the assessment of any tax imposed by this Act or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distress or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (A) within six years after the assessment of the tax, or (B) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer. (U. S. C., Title 26, Section 1432.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

TITLE I—INCOME TAX

SUBTITLE A—INTRODUCTORY PROVISIONS

SEC. 1. APPLICATION OF TITLE.

The provisions of this title shall apply only to the taxable year 1928 and succeeding taxable years. Income, war-profits, and excess-profits taxes for taxable years preceding the taxable year 1928 shall not be affected by the provisions of this title, but shall remain subject to the applicable provisions of prior revenue Acts, except as such provisions are modified by Titles III, IV, and V of this Act or by legislation enacted subsequent to this Act.

SEC. 311. TRANSFERRED ASSETS.

(a) *Method of collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) *Transferees.*—The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title.

(2) *Fiduciaries.*—The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer.

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) *Period of limitation.*—The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) In the case of the liability of an initial transferee of the property of the taxpayer,—within one year after the expiration of the period of limitation for assessment against the taxpayer;

(2) In the case of the liability of a transferee of a transferee of the property of the taxpayer,—within one year after the expiration of the period of limitation for assessment against the preceding transferee, but only if within three years after the expiration of the period of limitation for assessment against the taxpayer;

except that if before the expiration of the period of limitation for the assessment of the liability of the transferee, a court proceeding for the collection of the tax or liability in respect thereof has been begun against the taxpayer or last preceding transferee, respectively,—then the period of limitation for assessment of the liability of the transferee shall expire one year after the return of execution in the court proceeding.

(3) In the case of the liability of a fiduciary,—not later than one year after the liability arises or not later than the expiration of the period for collection of the tax in respect of which such liability arises, whichever is the later.

TITLE III—AMENDMENTS TO 1926 INCOME TAX

SEC. 504. SUSPENSION OF RUNNING OF STATUTE OF LIMITATIONS.

(a) Section 277 (b) of the Revenue Act of 1926 is amended to read as follows:

(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of dis-

straint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter.¹⁸

- (b) Subsection (a) of this section shall apply in all cases where the period of limitation has not expired prior to the enactment of this Act.

SEC. 505. SAME—TRANSFeree CASES.

- (a) Section 280 (d) of the Revenue Act of 1926 is amended to read as follows:

(d) The running of the statute of limitations upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter.

- (b) Subsection (a) of this section shall apply in all cases where the period of limitation has not expired prior to the enactment of this Act.

SEC. 506. WAIVERS AFTER EXPIRATION OF PERIOD OF LIMITATION.

(a) Section 278 (e) and (d) of the Revenue Act of 1926 are amended to read as follows:

(c) Where before the expiration of the time prescribed in section 277 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(d) Where the assessment of any income, excess-profits, or war-profits taxes imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the period of limitation properly applicable thereto, such tax may be collected by distressment or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

